

J. Haas

CITY OF LAKE FOREST



CONTROL BOARD
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August 22, 2007

Mr. John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Via US Mail and Fax 858-571-6972

Mayor
Richard T. Dixon
Mayor Pro Tem
Mark Tetterer
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Kathryn McCullough
Marcia Rudolph
City Manager
Robert C. Dunek

Subject: Comments on Revised Tentative Order No. R9-2007-0002, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood control District Within the Sand Diego Region

Dear Mr. Robertus:

The City of Lake Forest (City) respectfully submits this letter to the California Regional Water Quality Control Board, San Diego Region (SDRWQCB) to convey the City's formal written comments on Revised Tentative Order No. R9-2007-0002/NPDES Permit No. CAS0108740 (Permit).

As an initial matter, the City would like to commend the SDRWQCB for modifying the Permit in response to comments submitted by the Copermittees. The changes indicate an effort on the part of the SDRWQCB and its staff to work with the Copermittees to develop a mutually beneficial Permit.

The City is aware that the County of Orange (County) is submitting a similar comment letter regarding specific conditions contained in the Permit. The City would like to express its support for the County's comments, and intends the comments contained in this letter to supplement those submitted by the County and the other Copermittees.

Like the County, the City continues to have certain concerns about the way the SDRWQCB has structured the Permit. The City, therefore, submits the following comments to continue the open dialogue between the Copermittees and the SDRWQCB, and to facilitate further collaboration on the development of a Permit that both promotes water quality improvement, and meets the needs of the Copermittees. A description of the City's other concerns is set forth below.



SDRWQCB Needs to Provide a Response to Comments on the Revised Tentative Order.

It is the City's understanding that the SDRWQCB is not planning to provide a response to the Copermittee's comments for the Permit. The City requests that the SDRWQCB provide a response to the comments contained in this letter. The Permit contains new provisions that were not addressed in previous permit iterations or comments; therefore, comments regarding these new provisions necessitate a response from SDRWQCB. Additionally, a number of comments contained in this letter request clarification of Permit provisions. The City cannot receive the written clarification it has requested if the SDRWQCB declines to respond to comments.

The Permit Fails to Cite Applicable Authority or otherwise Support the Exceedence of Federal Requirements.

Many of the Permit's requirements exceed those established by EPA regulations. The SDRWQCB needs to delineate the sources of authority that require SDRWQCB to exceed those requirements. As stated in our previous letter, such documentation is necessary because those portions of the Permit that exceed the federally required minimum represent state mandates within the meaning of Article XIII B § 6 of the California Constitution. Although the SDRWQCB has stated that none of the Permit provisions exceed federal requirements, and therefore do not constitute unfunded state mandates, the City disagrees with this assessment. (*See City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619-21; and *County of Los Angeles v. Commission on State Mandates*, (2007) 150 Cal. App. 4th 898, 915-18 (stating that whether the Los Angeles County MS4 Permit constitutes an unfunded State mandate is a question for the Commission on State Mandates).)

It is worth noting that the City's request for such a differentiation is in no way a reflection of its willingness to implement the Permit. To the contrary, in order to allow the City to seek reimbursement from the State so that it can adequately fund its storm water program, and thereby fully implement the Permit, the City needs the SDRWQCB to accurately support each Permit requirement with citation to the Federal authority that *requires* the Permit to include the relevant provision. Those portions of the Permit that are not required by any federal authority represent state mandates, and the City is entitled to reimbursement for the cost of implementing them.

The Permit Improperly Requires the Copermittees to Regulate Phase II Entities.

The Permit holds the Copermittees responsible for inputs into their respective MS4s from what the EPA has classified as Phase II storm water dischargers. Most of these entities qualify as local agencies within the meaning of the Government Code. (Cal. Gov. Code § 53090) Pursuant to the Government Code, the Copermittees have minimal authority over their conduct. (Cal. Gov. Code § 53091) This is especially true with regard to school facilities which are exempt from many of the conditions that the Permit will require the City to enforce. Such exemptions significantly limit the ability of the Copermittees to

regulate stormwater discharges from local agencies.

The City made this comment in its last letter to the SDRWQCB. While the SDRWQCB did provide a response, its overall response failed to adequately acknowledge the inability of the Copermittees to regulate Phase II entities. (*See Response to Comments, p. 7.*) At a minimum, the Permit should be amended to reflect this lack of authority, and should be rewritten to absolve the Copermittees of responsibility for enforcing stormwater regulations against those entities that have been issued Phase II Permits, or have been classified by the State Water Resources Control Board as "Non-traditional Small MS4s anticipated to be designated in the future."

The Permit Does not Clearly Allocate Responsibility for BMP Implementation for Flood Control Structure.

Permit section D.3.a.(4) requires each Copermittee to implement procedures to assure that flood management projects assess water quality impacts, and requires all Copermittees to evaluate their existing flood control devices for impacts on storm water quality. This is despite the fact that the Orange County Flood Control District owns, operates and maintains virtually all of the flood control devices in the Permit area.

The City raised this issue in its last letter to the SDRWQCB, and the SDRWQCB responded stating:

The Regional Board appreciates the fact that many structural flood control devices are owned and operated by the Orange County Flood Control District, which is also a Copermittee. *Each Copermittee must meet the requirements of the Tentative Order for its structural flood control devices.* The Regional Board expects that the Flood Control District and other Copermittees will communicate with each other regarding structures owned by the District that serve other municipalities.

(Response to Comments, p. 58, *emphasis added.*)

The SDRWQCB's response implies that it will not hold the City responsible for the maintenance and impact of flood control structures that the City lacks the authority to control. While this language is helpful, in order to clarify responsibility for flood control structures, the Permit should be revised to reflect the SDRWQCB's response to comments.

Permit section D.4.h. Does Not Adequately Define the Requirements for Compliance.

Permit section D.4.h. has been modified to state that the Copermittees must "implement management measures and procedures to prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems)."

Because it is unclear what is meant by “management measures and procedures”, it is unclear what compliance with this section will require. The City is concerned that the ambiguity created by this language will be used to require a comprehensive management program. The City therefore requests that SDRWQCB clarify what is meant by the terms “management measures and procedures” so that the Copermittees may properly comment on the potential requirements.

The Permit Improperly Holds Copermittees Responsible for the Maintenance and Operation of Sanitary Sewers.

Permit sections D.3.a.(7), and D.4.h. require the Copermittees to implement controls to prevent and eliminate infiltration of seepage from sanitary sewers to MS4s, and to prevent, respond to, contain and clean up all sewage that may discharge into their MS4.

The City previously noted that these requirements are unnecessary because the City, as well as most of south Orange County, is serviced by numerous water districts that own, operate, and maintain their own sanitary sewer infrastructure. The SDRWQCB responded stating that the requirements included in Permit § D.3.a.(7) are “reasonable functions of MS4 operators.” (Response to Comments, p. 58.)

Permit sections D.3.a.(7), and D.4.h. do not address a situation where MS4 operators are “passively accepting” runoff from another entity. Rather, seepage and other spills are the result of poor maintenance on the part of other entities such as the sanitary sewer operator. Accordingly, in order to limit such inputs to the MS4 the Copermittees must essentially oversee the operations and maintenance of the sanitary sewer operators within the Copermittees respective jurisdictions. Such oversight of a local agency’s activities is not the traditional, or appropriate role of an MS4 operator.

The City, therefore, requests that the SDRWQCB limit the requirements contained in these sections, and revise them to clearly state that those Copermittees who do not own or operate their own sanitary sewer systems are only required to work cooperatively with local sanitary sewer operators to prevent seepage and other spills from entering the MS4.

The Permit Should not Require BMP Implementation for Mobile Businesses.

Despite comments from a number of the Copermittees, Permit section D.3.b.(3) still requires the development and implementation of a number of programs to reduce the discharge of pollutants from mobile businesses. As a practical matter, these requirements will be very difficult to enforce.

The SDRWQCB responded to the City’s previous comments on this issue stating:

The language in the Tentative Order is intended to provide broad flexibility to the Copermittees to account for the individual make-up of each municipality and for the difficulties with identifying and

communicating with mobile business operators. This section has not been revised.

(Response to Comments p. 60.)

While the City welcomes the SDRWQCB's efforts to provide the Copermittees with broad flexibility, the City feels that the difficulties associated with regulating mobile businesses outweigh any benefits provided by such flexibility.

The SDRWQCB should therefore revise this section of the Permit to provide the Copermittees with the discretion to focus on mobile sources when they identify them as a significant source of stormwater pollution affecting their jurisdiction. As is the case with residential, individual car washing, the City will have the opportunity, and authority to regulate such discharges if they are, or at any time become, a "significant source of pollutants to waters of the U.S."

The Permit should not Require a Long Term Business Plan.

The SDRWQCB declined to change the requirement that the Copermittees develop a business plan for their respective stormwater programs. Consequently, Permit section F.3. will still require each Copermittee to submit a business plan that identifies a long term funding strategy for program evolution and funding decisions.

In response to the City's previous comments on this issue, SDRWQCB provided the following justification:

Currently each Copermittee provides an annual estimate of its budget for the upcoming annual reporting period. This does not demonstrate that each proposed program activity will be fully implemented because many proposed activities either have longer construction periods or require future expenditures for operation and maintenance (O&M).

(Response to Comments, p. 68.)

As stated in our previous comment, the City does not always have information on the future sources of funding for its stormwater program. This makes production of a "Business Plan" difficult. More importantly, the SDRWQCB does not need to know the long term funding sources for each Copermittee's storm water program. Requiring such a report is overreaching in a manner that will unnecessarily cost the Copermittees additional time and resources.

Notably, the applicable Federal Regulations do not require a long term funding plan such as that currently required by the Permit. The Federal Regulation cited by the SDRWQCB in its response to comments does not support the requirement that each Copermittee develop a long term funding plan. As written, 40 C.F.R. § 122.26(d)(2)(vi) states:

For each fiscal year to be covered by the permit, a fiscal analysis of the

necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

Any mention of funding beyond each fiscal year is absent from this regulation. In fact, 40 C.F.R. § 122.26(d)(2)(vi) requires nothing more than an annual assessment of funding. Consequently, the current requirement that the Copermittees provide an annual estimate of their budget for the upcoming annual reporting period is fully compliant with federal regulations, and more stringent requirements are unnecessary.

Moreover, the Copermittees have not given the SDRWQCB any reason to need a long term funding assessment. Although the response to comments cites a number of projects that will require long term funding, to date, the Copermittees have not under-funded any portion of their respective stormwater programs. If the Copermittees are unable to fund their stormwater programs because of a lack of planning, they will be in violation of the Permit. This result is sufficient to ensure adequate funding for all aspects of the Copermittees programs.

Although there may be benefits to long term financial planning, the authority and onus for implementing a long term plan properly resides with the individual Copermittees. The City therefore requests that the SDRWQCB amend the Permit and recommend rather than require a "Business Plan."

The Permit's Hydromodification Requirements May Preclude Superior Alternatives.

In its previous letter, the City provided limited comments on the issues raised by Permit's hydromodification requirements. The City is fully aware of the benefits that limiting the impact of hydromodification can have for water quality. However, the City is concerned that the Permit may limit otherwise effective forms of hydromodification best management practices by dictating specific requirements.

The City therefore requests that the SDRWQCB limit the requirements of Permit, including sections D.1.h., and D.1.d.(4)-(6) to allow the Copermittees to require management procedures that will prevent adverse impacts on downstream hydrologic conditions *in any format the Copermittees may choose*. This broad level of discretion will allow the Copermittees to ensure that innovative stormwater solutions are developed in a manner that is complementary to the applicable development project.

Conclusion.

We appreciate your attention to our comments. As stated at the beginning of this letter, the City views these comments as part of the on-going, open dialogue between the Copermittees and the SDRWQCB to help develop an effective Permit for this region.

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The City is committed to the goal of water quality improvement and wants to work with the SDRWQCB in developing the most cost-effective way to reach that goal. We look forward to receiving your response to the above comments and concerns. If you should have any questions, please contact Devin Slaven, Water Quality Specialist, at (949) 461-3436.

Sincerely,
CITY OF LAKE FOREST



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cc: Robert C. Dunek, City Manager
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